United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2400

To be argued by
RICHARD J. HOSKINS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2400

UNITED STATES OF AMERICA,
Appellee,

—v.—

LARRY SESSION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2400

UNITED STATES OF AMERICA,

Appellee,

—v.—

LARRY SESSION,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Larry Session appeals from a judgment of conviction entered on October 22, 1974, after a two-day trial before the Honorable Edward Weinfeld, United States District Judge, and a Jury.

Indictment 74 Cr. 673, filed on July 8, 1974, charged Session in one count with conspiracy to embezzle mail, in violation of Title 18, United States Code, Section 371.*

Trial commenced on October 16, 1974 and concluded on October 17 with a guilty verdict.

* The indictment also charged Jose R. Quiles in the conspiracy count and in three substantive counts of mail embezzlement. Title 18, United States Code, Section 1709. Quiles pleaded guilty to one count of embezzlement before trial.

On October 22, 1974, Judge Weinfeld committed Session to the custody of the Attorney General under Title 18, United States Code, Section 5010(b) as a youth offender, with execution of all except three months of the sentence suspended pursuant to Title 18, United States Code, Section 3651. Session was also placed on probation for two years, to commence upon his release from custody, pursuant to Title 18, United States Code, Section 5010(a).

Session was remanded immediately to begin serving his sentence.

Statement of Facts

Government's Case

During January and February of 1974, Session was a sub-clerk in the Penn Terminal section of the Central Post Office whose job was to "cull" from sacks of incoming mail large or irregularly shaped envelopes which would not fit into the letter sorting machine (Tr. 15-18, 96-97).

In the early morning hours of February 12, 1974, Postal Inspectors watching from a hidden observation gallery saw Session select from his working tray an envelope addressed to the Silesian Mission Association, rip the flap open, look around from side to side, remove the money from the envelope, put it in his pocket, and send the empty envelope on to the sorting machine. (Tr. 18-21). Later that morning, Session selected two more Silesian Mission envelopes and placed them in the tray of Jose Quiles, who was working a few steps behind Session in the New York State culling section. Quiles took the envelopes out of his tray, placed them in his pocket, and left the room. (Tr. 21-22).

At the beginning of the early morning shift of February 16, 1974, Postal Authorities placed approximately 150 "test" letters into the mail stream headed for the New

York State culling section. The letters were addressed to various charities and contained pre-copied dollar bills. (Tr. 25-32). Shortly after midnight Session tore at the flaps of a plain white envelope, replaced it on his tray without removing the contents, looked from side to side, tore the envelope the contents, looked from side to side, tore the envelope again, replaced it on his tray, and finally sent the envelope on its way to the sorting machine. (Tr. 24-25). Thereafter, Session removed several test envelopes from his tray at several different times and handed them either to Quiles or to one Copes, another culling section worker. Quiles either tore open each envelope given to him and put the money into his pocket or folded the envelope into his pocket, then left the working floor. (Tr. 22-24, 74-77, 85-87). Later on the morning of February 16, 1974, Postal Inspectors arrested Session, Quiles, Copes and other culling section workers.

The Government introduced in evidence a number of dollar bills recovered from Quiles which matched the earlier photocopied dollar bills placed into test envelopes. The torn envelopes recovered from the work floor were also put in evidence. (Tr. 59-69).

The Government also introduced Session's post-arrest confession given to Postal agents on February 16, 1974 (Tr. 87-99). The confession was in the form of two statements and contained the following admissions:

> "On February 16, I reported for duty at 12:00 a.m. and was assigned to culling the mail. I separate the mail for the letter sorting machines.
>
> "Approximately 3:00 a.m. I came across a letter addressed to Fransican Missions, Mt. Vernon, New York, which I thought contained money. So I passed it to another employee. He had previously asked me to pass him letters which I thought contained money.

"At about 3:15 a.m. I came across two letters addressed to Silesian Missions, New York, which I also thought contained money. I gave these to a second employee who had also asked for them. I did this for these employees because we are close friends.

"I have been handing off letters to these two friends for about one month. I would guess I have done this maybe fifty times.

"The statement that I gave to the Postal Inspectors involving myself when I handed letters that I thought contained money to other employees involved along with myself one Gregory Copes and Jose Quiles who, as I stated, are fellow employees." (Tr. 97-98).

Defense Case

Session took the stand in his own behalf and testified that during his tenure at the Post Office he never stole a letter, but he did from time to time take letters from his tray which he thought contained cash and give them to other workers. He did this, he said, as a kind of joke. Postal workers were always being told that they must not steal money from the mail and so he would pick out an envelope containing money, toss it to one of his friends on the job, and tell him to go buy a cup of coffee. Session said he never had any idea that some of his friends were removing money. (Tr. 129-34).

On cross-examination, Session said that he tossed envelopes which he thought contained money to his friends on the job perhaps five hundred times or more during his six months as a Postal employee. (Tr. 142-45, 151-52).

With regard to his statement after arrest, Session said that after being interviewed by the Postal agents they asked

him to write a statement, which he did. He said that he discussed virtually every sentence with the agents and that the way the statement was written as well as some of the language was a result of the suggestions of the agents. (Tr. 134-37). However, he said that everything in the statement was true, that at the time he wrote the statement he was not afraid of including in it anything which was true, that there was nothing in the statement about the passing of the envelopes being a joke, and that in fact he did not mention to the agents that his passing of envelopes was a joke. (Tr. 154-58).

Session also called Postal Inspector Husarik to narrate the Government's videotapes taken from the hidden observation gallery on February 15 and 16, 1974. The tape showed four of Session's co-workers rifling letters at various times. It also showed Session putting a letter in his armpit and taking it over to a co-worker who removed it. (Tr. 159-67).

ARGUMENT

POINT I

The trial court's refusal to permit the showing of the February 13, 1974 videotape was not an abuse of its discretion.

At the beginning of the defense case, the Court denied Session's application to show the jury a videotape of Postal employees in the culling section of the Post Office on February 13, a night when Session did not work, although he did permit Session to show the jury videotapes made on February 15 and 16, when Session was on the job. (Tr. 122-25; 159-69) Claiming that the February 13 tape was not only relevant but that its exclusion by the Court deprived him of a fair trial, Session makes two somewhat in-

consistent arguments for the admissibility of the tape. First, he urges that it would show the jury the "horseplay," dancing, lack of work, and generally loose atmosphere that prevailed among the workers. Second, he argues that it was important for the jury to be able to see the "furtive and surreptitious manner in which the embezzlements were accomplished, as juxtaposed to the open and notorious manner that the appellant gave the letters which he believed contained money to co-workers." (Appellant's Brief 8)

In the first place, these arguments for the introduction of the February 13 videotape were never made to the trial court. Counsel's justification to Judge Weinfeld for the introduction of the videotape are contained entirely in the following two sentences:

> "I think that I would like the jury to know the atmosphere and the ambiance, so to speak, of the work area, as to what was going on. They will observe other facts by people having nothing to do with this defendant, and I think it will place in context the actions that they do see of this defendant when he does give letters to his fellow employees." (Tr. 124).

Hearing no offer of proof or relevance other than this, the Court denied the application. The claims now made bear little resemblance to what Session told Judge Weinfeld, and Session cannot have the ruling reversed on the basis of arguments never made below. See *United States* v. *Capra,* 501 F.2d 267, 272 (2d Cir. 1974); *United States* v. *Bryant,* 480 F.2d 785, 789-90 (2d Cir. 1973); *United States* v. *Wright,* 466 F.2d 1256, 1259-60 (2d Cir. 1972), *cert. denied,* 410 U.S. 916 (1973); *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966). The same principle is found in Rule 103(a) of the Federal Rules of Evidence:

> "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * * * *
>
> (2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

But even if Session's present arguments had been made to Judge Weinfeld, exclusion of the February 13 videotape would have been appropriate because it was both cumulative and irrelevant. To the extent that it was relevant to contrast Session's open and notorious manner to that of his "surreptitious" co-workers, that was accomplished in the videotape viewed by the jury (Tr. 162-67, 175), and by the Government's own witnesses (*see, e.g.,* Tr. 79-80). Obviously, for Session's defense that he was not a knowing participant in any conspiracy, his openness was much more important than the other workers' furtiveness, and a videotape in which Session did not appear is not even slightly relevant to the former issue.

As for "horseplay" and a loose atmosphere, which formed the core of the defense argument, they were virtually conceded by the Government throughout the trial; the disagreement focused on whether, notwithstanding such horseplay, Session knew what was happening to the scores of pieces of mail he was turning over to his friends. Postal Inspector Husarik conceded that when Session removed a letter from his tray and took it over to Quiles, he "waved" or "shook" it in front of Quiles and made no attempt to "hide the fact that he was passing the envelope to the next work area." (Tr. 79-80). In narrating the February 16 videotape, Inspector Husarik pointed out both Session's putting a letter under his armpit where it was visible and walking over to a co-worker and his dancing

around the floor with another employee named Lee. (Tr. 166). Indeed, defense counsel told the jury in his summation: "There's no dispute that they had a loose, carefree atmosphere in that work area because we saw it on the tapes." (Tr. 182).

What was disputed was an issue to which the February 13 tape was completely irrelevant: was Session's passing of so many letters done with criminal intent or was it merely "horseplay"? As Judge Weinfeld instructed the jury, this was strictly an issue for their resolution:

> "Was the handing over of letters by defendant to Quiles and others which Session knew usually had money in them a joke, or horseplay? Or was it done with criminal intent as part of a conspiracy of which he was a member to embezzle mail and its contents? This is an issue for you to decide." (Tr. 221).

The degree of relevancy required for the admission of evidence is a matter within the sound discretion of the trial court. *United States* v. *Gottlieb,* 493 F.2d 987, 992 (2d Cir. 1974); *United States* v. *Catalano,* 491 F.2d 268, 273 (2d Cir. 1974), *cert. denied,* — U.S. —, 43 U.S.L.W. 3208 (October 15, 1974); *United States* v. *Kahn,* 472 F.2d 272, 280 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973). The exercise of that discretion will not be disturbed on appeal except in cases of manifest abuse. *United States* v. *Gottlieb, supra; United States* v. *Bowe,* 360 F.2d 1, 15 (2d Cir.), *cert. denied,* 385 U.S. 961 (1966). Far from being an abuse of discretion, Judge Weinfeld's exclusion of the February 13 tape was wholly proper.

POINT II

It was not error for the prospective jurors to hear the colloquy about Session's late arrival.

On the first day of trial, Session was approximately an hour and a half late arriving in court. During that interval, the panel of prospective jurors sat in the courtroom and, at 10:00 o'clock, heard Judge Weinfeld ask where the defendant was, comment that the defendant "was told to be here at 10:00 o'clock sharp", and finally apologize to the panel for the inconvenience but explain that "we just have to wait". (Tr. 2-5).

Session claims that this forced wait and the colloquy between the court and counsel were so prejudicial that his conviction should be reversed. This contention borders on the frivolous. While Judge Weinfeld may have been concerned that defendant was not present when he was supposed to be, his comments were hardly intemperate and his conduct communicated to the jury no adverse general opinion as to the defendant's guilt or innocence on the charges to be tried. When the defendant arrived, Judge Weinfeld stressed to the jurors the importance of being absolutely fair and open-minded as to the ultimate issues to be tried and exhorted them to guard against permitting any impression to become firm and fixed until all the evidence was in. (Tr. 7-8).*

The test by which to measure the propriety of the trial judge's conduct in the jury's presence was stated in *United States* v. *Nazzaro*, 472 F.2d 302, 303 (2d Cir. 1973):

> ". . . [A] judge's participation during trial—whether it takes the form of interrogating witnesses, address-

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* Session charges that "the error is further compounded" by the court's emphasizing to the jury that the conduct of a witness should be observed as carefully as his testimony. In fact, Judge Weinfeld stressed the importance of observing each witness' conduct *during the course of his testimony.* (Tr. 7)

> ing counsel, or some other conduct—must never reach the point at which it appears clear to the jury that the court believes the accused is guilty."

See also, United States v. *Guglielmini,* 384 F.2d 602, 604-05 (2d Cir. 1967).

Judged by this standard, it is obvious that Judge Weinfeld's brief remarks caused no harm to the defendant. The most that can be said is that the remarks may have suggested to the veniremen that Judge Weinfeld thought the defendant should have been on time for his trial. This is hardly the stuff of which prejudice is made, nor did it deprive the defendant of a fair trial. *See United States* v. *Gonzalez,* 483 F.2d 223, 225-26 (2d Cir. 1973); *United States* v. *Colabella,* 448 F.2d 1299, 1301-03 (2d Cir. 1971), *cert. denied,* 405 U.S. 929 (1972). *Cf., United States* v. *Hendrix,* 505 F.2d 1233, 1237 (2d Cir. 1974); *United States* v. *Weiss,* 491 F.2d 460, 467-69 (2d Cir. 1974), *cert. denied,* — U.S. —, 43 U.S.L.W. 3209 (Oct. 15, 19[illegible]); *United States* v. *Kaylor,* 491 F.2d 1127, 1130 (2d Cir. 1973); *United States* v. *Newman,* 481 F.2d 222, 223-24 (2d Cir.), *cert. denied,* 414 U.S. 1007 (1973); *United States* v. *Fernandez,* 480 F.2d 726, 735-38 (2d Cir. 1973); *United States* v. *Boatner,* 478 F.2d 737, 738-42 (2d Cir.), *cert. denied,* 414 U.S. 848 (1973). The trial court's conduct may become the basis for reversal if, viewed in the context of the entire trial, it destroyed the "impartial, judicious, and, above all, responsible . . . courtroom atmosphere in which guilt or innocence [must] be soberly and fairly tested". *United States* v. *Brandt,* 196 F.2d 653, 655-56 (2d Cir. 1952). Not even Session suggests that anything in his trial approached that circumstance.

POINT III

The trial court properly refused to charge that the jury might find that the embezzlement of February 12, 1974, was an isolated incident.

Judge Weinfeld instructed the jury that testimony concerning the embezzlement of mail by Session on February 12, 1974 was introduced by the Government as tending to prove the existence of the alleged conspiracy. (Tr. 218). At the sidebar following the charge, counsel for Session requested the Court for the first time to instruct the jury also that even if it believed that Session embezzled a letter on February 12, "they could also find that that was an isolated incident". (Tr. 226). Judge Weinfeld properly refused.

Clearly, whether the February 12 embezzlement occurred and, if so, whether it was evidence of participation in a conspiracy or was an isolated incident of Session's acting on his own, were all jury questions. In his summation, defense counsel urged the jury to disbelieve the Government's witness and conclude that the embezzlement did not occur. (Tr. 171-73). Significantly, however, counsel did not make the second argument—that, even if the embezzlement occurred, the jury should conclude that it was unrelated to the conspiracy. It is tempting to surmise that having failed to make the second argument, either for tactical reasons or through oversight, counsel sought to have the Court suggest it in its charge. The Court's refusal was hardly an abuse of its discretion.

Session's reliance on the "single act" cases to support his request is wholly unfounded. The "single act" doctrine stems from an opinion by Judge Learned Hand in *United States* v. *Reina*, 242 F.2d 302 (2d Cir. 1957), in which the Court resolved a statute of limitations issue in de-

fendant's favor by concluding that the fact that he made one narcotics sale was insufficient standing alone to permit the inference that he was a participant in a large narcotics conspiracy. In *United States* v. *Carminati,* 247 F.2d 640 (2d Cir. 1957), and *United States* v. *Kane,* 351 F.2d 600 (2d Cir. 1965), upon which Session relies, the doctrine was held inapplicable; in *Carminati* because there was evidence other than the single transaction pointing to defendant's participation in the conspiracy, and in *Kane* because the single transaction was central to the conspiracy. *See also, United States* v. *Torres,* 503 F.2d 1120, 1123-24 (2d Cir. 1974); *United States* v. *Ramirez,* 482 F.2d 807 (2d Cir.), *cert. denied,* 414 U.S. 1070 (1973); *United States* v. *DeNoia,* 451 F.2d 979 (2d Cir. 1971).

In the "single act" cases the issue is whether a defendant's only act or transaction was sufficient to bring him within the ambit of the larger conspiracy. Session does not raise that issue on this appeal presumably because the February 12 embezzlement was a small part of the Government's proof and there was substantial other evidence—including the activities on February 16 and his own confession—to implicate him in the conspiracy. Rather, he urges that it was error for Judge Weinfeld to refuse to suggest to the jury in the language of the "single act" cases that they might find that the embezzlement was independent of the conspiracy. However, the "single act" cases formuate an evidentiary standard to be applied by the Court in judging the sufficiency of the Government's proof as a whole. None of the "single-act" cases even suggest that a jury should be charged in such language regarding the adequacy of a particular isolated portion of the Government's proof, standing alone, to support a finding of guilt. And even if such a change were appropriate in cases in which the Government's proof showed only a "single act" by a defendant, it would have been inapplicable in this case because the February 12 embezzlement was far from a "single act" standing alone.

Judge Weinfeld defined the elements of the crime and the Government's burden of proof as to each element beyond a reasonable doubt. Further elaboration, given the evidence, would have been wholly unwarranted. *Cf., United States* v. *Rosa,* 493 F.2d 1191, 1195 (2d Cir. 1974), *cert. denied,* — U.S. —, 43 U.S.L.W. 3210 (October 15, 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD J. HOSKINS being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of February, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

David A. Pravdd
10 East 40th Street
New York, N.Y. 10016

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard J. Hoskins

Richard J. Hoskins

Sworn to before me this
10th day of Feb 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975